YAYASAN SABAH & ANOR

v.

YAP & SON BORNEO ENTERPRISE SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, TAWAU
IAN HC CHIN J
[SUIT NO: T 62 OF 1988]
27 OCTOBER 1997

CIVIL PROCEDURE: *Documents - Failure to adduce in evidence - Whether court can rely on alleged admissions contained in documents not admitted in evidence*

CIVIL PROCEDURE: *Pleadings - Defence - General form of traverse - Whether sufficient to deny plaintiffs' allegations - Rules of the High Court 1980, O. 18 r. 13*

EVIDENCE: *Admissions - Letters not adduced in evidence - Whether court could infer agreement between parties that evidence of it should not be given - Evidence Act 1950, s. 23*

The plaintiffs brought an action against the defendants for the sum of RM1,636,729.30, being damages for trespass and various injunctions, alleging that the servants of the first defendant illegally entered into the plaintiffs' timber concession and extracted timber. The plaintiffs relied on: (i) a letter from the first defendant dated 12 January 1987 in which the first defendant allegedly admitted the illegal encroachment and felling and offered to pay damages; (ii) a joint and several guarantee by the third to fifth defendants under which they had agreed to pay the 'whole amount' recoverable from the first defendant for the 'illegal felling'; and (iii) a memorandum of understanding ('MOU') under which the first defendant had agreed to pay RM1,397,840.78 as liquidated damages. The defendants denied trespass and alleged that the letter dated 12 January 1987 was induced by an understanding that they would work out an amicable out-of-court settlement and that the guarantee was executed under undue influence and alternatively, on the understanding that the plaintiffs would not commence legal proceedings. The plaintiffs admitted that RM50,000 was paid by the defendants to the plaintiffs although the exact date of payment was unclear. The defendants counterclaimed for the return of the RM50,000, for misrepresentation and undue influence.

Held:

[1] Although the statement of claim adverted to a guarantee, neither the prayers nor the closing address of the plaintiffs' counsel referred to it. It was also not admitted in evidence and did not fall to be considered. As such, the court was constrained to only consider the cause of action based on trespass.

[2] There was no proof of trespass on the first defendant's part, whether oral or documentary. The alleged admission in the letter of 12 January 1987 could not be relied on as the letter was not adduced in evidence. Although the defendants admitted issuing the letter, the plaintiffs still had to prove that it contained the alleged admission of trespass and illegal felling, which it could only do by applying to have the letter admitted as evidence. This the plaintiffs had not done. An admission in civil cases is not relevant if it is either made upon an express or implied condition that evidence of it is not to be given or made under circumstances from which a court can infer that the parties agreed that evidence of it should not be given, as provided for in s. 23 of the Evidence Act 1950.

[3] The defendants had included a general form of traverse in their defence, which was accepted as being sufficient compliance with O. 18 r. 13 of the Rules of the High Court 1980 to deny the plaintiffs' allegations.

[4] The court accepted the second defendant's evidence that the first defendant signed the MOU in order to resolve the issue amicably and to maintain good relations with the first plaintiff even though the first defendant had not committed trespass and illegal felling.

[5] As such, the plaintiffs' claim against all the defendants was dismissed with 80% costs to the defendants in order to take into account the defendants' failure to prove their counterclaim and to establish undue influence or misrepresentation.

[Claim dismissed.]

Legislation referred to:
Civil Law Act 1956, s. 11
Evidence Act 1950, ss. 17, 18, 20, 23
Rules of the High Court 1980, O. 18 r. 13

Other source referred to:
Atkin's Court Forms, 2nd Ed. vol. 32, p. 35

For the plaintiffs - Seibing Gunting; M/s Donald Mojuntin & Seibing Gunting
For the defendants - Douglas Primus; M/s Lee & Thong

Reported by Anne Khoo

JUDGMENT

Ian HC Chin J:

Introduction

Yayasan Sabah ('the 1st plaintiff') and Rakyat Berjaya Sdn Bhd ('the 2nd plaintiff') took out the present action on 20 July 1988 but nothing was done to set the action down for trial till 2 June 1997 whence it was set down for trial after the court had given an "unless order" to strike out the action. The present counsel for the plaintiffs took over this case from the erstwhile counsel. The trial then proceeded on 2, 3, 4 and 5 September after which I reserved judgment.

The Pleadings

The plaintiffs prayers ask for judgment against Yap Sons Borneo Enterprise Sdn Bhd ('1st defendant'), Yap Kwee Ming ('2nd defendant'), Yap Sang ('3rd defendant'), Yap Kwi Fook ('4th defendant') and Choi Chai Moi *(*'5th defendant') for the sum of RM1,636,729.30, for damages for trespass and for various injunctions. The statement of claim, para. 7, alleged that the servants of the 1st defendant "illegally and wrongfully entered into the concession and ... illegally extracted and removed timber" to the value of RM2,785,290.86. The next relevant part of the statement of claim is para. 12 which alleged that the 1st defendant by a letter dated 12 January 1987 admitted the encroachment and illegal felling and offered to pay damages while pledging three land titles as security for payment. Then para. 13 alleges the execution of a joint and several guarantee by the 2nd defendant, 3rd defendant, 4th defendant and 5th defendant dated 16 February 1987 under which they agreed to pay the "whole amount" recoverable from the 1st plaintiff for the "illegal felling". The next five paragraphs stated the evidence that followed the execution of the guarantee, *viz*. (1) that on 7 March 1987 a demand for payment was made on the 1st defendant; (2) that on 28 July 1987 a meeting was held between the plaintiffs and the 1st defendant and 2nd defendant resulting in a memorandum of understanding ('MOU') under which the 1st defendant agreed to pay RM1,397,840.78 as liquidated damages (and costs on an indemnity basis) and which sum was to be paid by the Forestry Department releasing RM400,000 to the 1st plaintiff with the balance to be paid before 4 August 1987; (3) that on 10 August 1987 the 1st defendant offered their fixed deposit sum of RM200,000; (4) that on 5 May 1988 the plaintiff agreed to accept RM1,000,000 plus legal fees of RM70,000 as damages provided the sums are paid in one lump sum; (5) that the plaintiffs granted indulgence to the defendants to assign RM784,398.14 to the plaintiffs that was owing by a

third party and to pay the balance of RM285,601.86 by 12 July 1988; and (6) that despite demand for payment, the defendants had failed to do so. The penultimate paragraph of the statement of claim before the prayers read:

> 20. By reason of the matters aforesaid the Plaintiffs have suffered loss and damage
>
> **Particulars**

Value of logs felled			MR2,785,290.86
Less -	Royalty	MR940,663.89	
	Logs sold by Tender	MR260,000.00	
			MR1,584,626.27
Add -	Survey cost and expenses of Plaintiffs	MR18,000.00	
	Cost incurred by Marketing Division of 1st Plaintiff	3,500.00	
	Legal costs to date (less MR20,000.00 paid)	50,000.00	
		Total:	MR1,636,729.30

The prayers that follow are in the following terms:

(i) The said sum of MR1,636,729.30;

(ii) Damages for trespass;

(iii) An injunction to restrain the parties mentioned in paragraph 12 from transferring pledging or howsoever deal with any interest in the lands held under titles CL115333303; CL115333340; and CL115333350 and the issue copies of title for the same be deposited with the Plaintiffs until payment in full;

(iv) An injunction to restrain the Standard Chartered Bank and the First Defendant whether by their servants or agents or any of them from disposing of or howsoever deal with the said amount of MR200,000 held in the fixed deposit account until further order;

(v) Costs on solicitor-client basis under paragraph 15 and 17;

(vi) Interest under s. 11 Civil Law Act 1956 from 1 November 1986 to date of Judgment;

(vii) Statutory interest on the decretal sum at the rate of 8% per annum from the date of Judgment until satisfaction in full;

(viii) Such other relief as the Honourable Court deems fit.

Though the statement of claim adverted to a guarantee but the prayers did not refer to it. The closing address of learned counsel for the plaintiff, Mr. Seibing Gunting, also did not to any cause of action based on the guarantee. In fact learned counsel only adverted to trespass in his closing speech which I will advert to later. Therefore, I am constrained by what had been said by learned counsel to state that the cause of action is based on trespass while the various documents referred to in the statement of claim were called in to prove trespass as those documents were alleged to contain admissions of the trespass.

As for the defence, it asserted that the 1st plaintiff has no *locus standi* to maintain the suit which I need not deal with in view of my conclusion on other issues. They denied trespass. As for the alleged letter of admission they said the letter was induced by and "was written on the basis of an understanding reached between the 1st defendant and the plaintiffs' officers wherein it was agreed between both the parties concerned work out an amicable out of court settlement". As for the guarantee, the defendants said the plaintiffs "exercised undue influence over the defendants and the said defendants had no alternative but to execute the said guarantee" and that alternatively the plaintiffs "misrepresented to the defendants that plaintiffs have no intention to commence civil proceedings and as an alleged aggrieved party they will not pursue the illegal felling matters in the criminal courts." As regards the events after the execution of the guarantee, that is the alleged letter of admission and the MOU, the defendants said they were the result of undue influence and misrepresentation that the civil claim will not be pursued save if the defendants defaulted. The defence went on to state:

12. The defendants say that their solicitors did on a without prejudice basis offered a full out of court settlement of $1,000,000.00 to the Plaintiffs. The Plaintiff counter offered, M$1,070,000 payable in one lump sum. As there was such a counter offer, the First Defendant's offer lapsed.

13. On the 12 July, 1988 the Defendants' solicitors again wrote to the Plaintiffs' solicitors on a without prejudice basis offering $1,000,000 as a final out of court settlement. The Defendants proposed to pay $602,035.05 by way of assignment of debts and balance of $197,964.95 by five monthly instalments. The first instalment payment of $50,000.00 was paid by way of cheque and was encashed by the Plaintiffs subsequently.

14. On the 12 August, 1988 the Plaintiffs caused the above Writ of Summons to be served on the defendants in breach of the agreement reached earlier between the two (2) parties and on the same day the Defendants through their solicitors gave notice to revoke their proposal and demand the return of the $50,000.

The defence then denied damages and counterclaimed the return of the $50,000 for misrepresentation and undue influence.

It is to the issue of trespass that I now turn to.

Whether There Was Trespass And Removal Of Timber

The undisputed evidence was that the Sabah Government had granted the 1st plaintiff 423 square miles of timber land concession at the Ulu Segama Forest Reserve. The 1st plaintiff had assigned the rights under the concession to the 2nd plaintiff but Mr. Douglas Primus, learned counsel for the defendants, had submitted that the assignment was without the consent of the Sabah Government which contention I need not deal with in view of my decision herein in favour of the Defendants on other issues which effectively dispose of the action herein.

As for the oral evidence as establishing the trespass and removal of timber, they have been spelt out in the following submission of Mr. Seibing, viz.:

SUMMARY OF PLAINTIFFS EVIDENCE

PW3 testified that sometime in November 1986 he made an aerial survey on a suspected area felled with the Plaintiffs Concession area. He landed on the area concerned and thereafter, he instructed the Branch Manager, Mr. Francis Chang for Lahad Datu to pursue further action.

Later, we came to know from Mr. Francis Chang that the company responsible for the illegal felling with the said concession area was YAP & SONS BORNEO ENTERPRISE SDN BHD.

DW3 the then DFO of Lahad Datu testified that there was a report made by the Plaintiffs Officers regarding the said illegal felling of timber. In respect of the area which was illegally felled by YAP & SONS BORNEO ENTERPRISE SDN BHD.

PW4 the Regional Forestry Officer Sandakan at the material time knew that the company responsible for the illegal felling within the said concession area was the 1st Defendant. PW4 testified that he instructed his staff to carry out ground enumeration with the support of the staff from the Plaintiffs' Lahad Datu branch.

PW5 and PW6 testified that they were part of the Plaintiffs' Lahad Datu branch who conducted the field survey and collected date pertaining to the area where illegal felling was committed by YAP & SONS BORNEO ENTERPRISE SDN BHD.

Those date were given to the Plaintiffs' Lahad Datu branch Manager. PW4 testified that the field survey report was sent to Head-quarters for necessary action.

PW7 testified that she was the Officer who supervised the preparation of [P3 (l)-(12)] in respect of the area which was illegally felled by YAP & SONS BORNEO ENTERPRISE SDN BHD.

PW2 who was head of the Forest Offences committee at the material time testified that a case regarding a forest offence committed by YAP & SONS BORNEO ENTERPRISE SDN BHD was referred to the Said Committee.

PW2 testified that [P3 (21)-(23)] was executed between the authorised representative, Mr. YAP KWEE MING of the 1st Defendant and the Plaintiffs, She went on to testify that she was one of the signatures of [P3 (21)-(23)] being the Chairman and Member of the Said Committee.

The other members of the committee who identified their signatures on [P3 (21)-(23)] were PW1, PW3 and PW8 who all testified that its purpose was for an amicable settlement as per the terms stated therein.

PW9 testified that he remembers a forest offence case in which YAP & SONS BORNEO ENTERPRISE SDN BHD encroached into the Plaintiffs Concession area.

He was then asked by the Plaintiffs to value the logs that were felled which amounted to RM2,785,290.86. This sum was the Plaintiffs' claim. *inter alia,* minus certain deduction under paragraph 8 of the Statement of claim.

It was not surprising that Mr. Primus had submitted that there was absolutely no evidence to establish trespass given what the plaintiffs had adduced and which Mr. Seibing had referred to, *supra.* PW3, mentioned in that submission, referred to Cerilinus Tan @ Gerald Pinso, a senior officer of the 1st plaintiff, who testified that he saw illegal felling in the concession area. He said he was told by a Francis Chang that the 1st defendant was involved and that he had also obtained various information from reading a letter from the said Francis Chang to the District Forest Officer which complained of the illegal felling. It is not known how Francis Chang came to know that the 1st defendant was involved. What is even worse, Francis Chang was not called to testify. As for reliance on the evidence of DW3, this witness was Joakim Beisit @ Jockland, the then District Forest Officer, who was called by the defendants to testify. This witness testified that the 1st defendant was not

involved in the business of timber extraction. He said the 1st defendant reported a theft of timber but did not enlist his assistance in the investigation. How such evidence can be proof of trespass is beyond comprehension. The evidence of PW4, Gerald @ Nonoi Hiu, was then relied on. This witness was at the relevant time the regional forestry manager of the 2nd defendant and he was based in Sandakan. He said he received instructions from Gerald Pinso to carry out enumeration of the logs felled. He said he was informed by Gerald Pinso that the illegal felling was done by the 1st defendant. That his evidence regarding who felled the timber was hearsay upon hearsay is too obvious as not to require any further comment. The hearsay saga continued when PW7, Quek Lip Arl @ Jennifer Wong, a cartographer who was at one time employed by the 2nd defendant, testified that she prepared a map on datum supplied by field surveyors, PW4 and PW5 who has also said without any foundation that the 1st defendant was involved in illegal felling, to show the extent of the illegal felling of timber done by the 1st defendant. She was merely being told the 1st defendant was the trespasser. As for the evidence of PW2, Susunah Chiu Mei Ling, the then chairman of a committee called the forest offence committee, she merely said that a MOU was signed by the representative for the purpose of agreeing on a sum as compensation. I do not see how such evidence can be of any assistance to establishing trespass. As for PW9, Vincent Gadalon, he said he remembered a case where the 1st defendant was suspected of encroaching into the concession area of the 1st plaintiff and he made the calculations of the figures for the claim for damages, his evidence obviously suffers the same hearsay malady.

Therefore, in so far as the oral evidence is concerned, it totally failed to establish trespass and illegal felling on the part of the defendants. This appears to have been admitted by Mr. Seibing when learned counsel in his closing said this:

> It is humbly admitted that there is no actual proof of the illegal felling required from the Plaintiffs on the ground if the existence of proof of the Defendants' admission/confession.

I turn now to question of the admission of trespass in the various documents. But I will first apprise myself of the relevant law.

An admission is defined by s. 17 of the Evidence Act, 1950, in these words: "An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned." Sections 18 to 20 mention persons by whom statements as defined in s. 17 must be made in order that they rank as admissions and these included admission by an agent of a party to the proceeding who was expressly or impliedly

authorised by the party to make the statement. However, an admission in civil cases is not relevant if it is either made upon an express or implied condition that evidence of it is not to be given or made under circumstances from which the court can infer that the parties agreed that evidence of it should not be given (s. 23, Evidence Act 1950). Where an admission is relevant the following principles set out by Sarkar on *Evidence,* 14th Ed. vol. 1, p. 317, would apply:

> The effect of an admission is to shift the burden of proof to the party making the admission. What a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted, the fact admitted must be taken to be established *(Chandra v. Narpat, sup; Bhag v. Jai* A 1919, L318*; Sadiqa v. Ataullah,* A 1935 L885*;* see s. 31 post*; "Proof of admission shifts the onus")* A person is bound by admission in the document executed by him. The presumption is that the recitals in the document are true and if he seeks to displace it, the onus is heavy on him *(Muneyya & Co v. Varadarajulu,* A 1964 AP 17). The value of admissions must depend upon the circumstances in which they are made and possible motives for incorrect statements by interested persons should not be ignored *(Mahadeo v. Baleshwar,* A 1939 A 626). A statement in a document should *prima facie* be accepted as true as against the executant unless it can be shown by independent evidence to be false *[Irshad Ali v. Kariman,* 22 CWN *530;* 460 IC 217; 20 Bom LR 790; A 1917 PC 160].
>
> ...
>
> A court is entitled to disregard an admission if it finds its truth inconsistent with other reliable evidence (*Bhawani v. Hakimullah,* A 1927 A175: 198 1C 821).

As for the documents alleged as containing the admissions and relied on by the plaintiffs to establish trespass and illegal felling, one is a letter dated 12 January 1987 from the 1st defendant to the 1st plaintiff. This document was included in a bundle which Mr. Seibing had intituled disputed bundle of DOCUMENTS. Both learned counsel had known from the outset of the case that all the documents in this bundle had to be proved. Inexplicably, no attempt was made to tender that document as evidence and this was notwithstanding that Mr. Primus had pointed this out when he was making his closing speech. Surely, if it was an oversight, Mr. Seibing could still apply to tender the same. This was not done. Instead, learned counsel submitted that the letter was admitted by the defence. Surely, you must still adduce evidence as to the particular letter that was admitted. The paragraphs of the pleadings which were thereafter referred to as showing the admission are para. 12 of the statement of claim and para. 9 of the defence, *viz.*:

12. By a letter under reference YSBE (KK)/3/87 dated 12th January 1987 from the First Defendant Company they admitted that their workers have encroached into the Concession and have illegally felled timber therein and offered to pay full damages to the First Plaintiff and in the interim pledge the following land titles as security for payment:

Land	Registered Owner
CL 115333303	Yap Sang
CL 115333349	Yap Kwee Lin
CL 115333350	Soo Yoo

The full contents of the aforesaid letter shall be referred to at the trial.

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9. As to paragraph 12 of the Plaintiffs' statement of claim the Defendants say that the said letter was written on the basis of an understanding reached between the First Defendant and the Plaintiffs' officers wherein it was agreed between both the Parties concerned work out an amicable out of court settlement. The Defendants will adduced evidence at trial to show that there was such an understanding where the Plaintiffs officers held out a promise to the Defendants to induce the First Defendant to write the said letter.

It is trite law that whatever is admitted by the pleadings need not be proved. Was the allegation of the admission of the trespass admitted by para. 9 of the defence? Order 18 r. 13 of the Rules of the High Court 1980 makes provision for the pleading of admission and denials and it is in the following terms:

(1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issues under rule 14 operates as a denial of it.

(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it i served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.

(4) Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.

Paragraph 12 of the statement of claim contain the following composite allegations, *viz.,* (1) the 1st defendant had issued a letter dated 12 January 1987, (2) the 1st Defendant by that letter admitted that workers of the 1st defendant trespassed into and removed timber from the concession area, (3) the 1st defendant by that letter offered to pay damages and (4) the 1st defendant by that letter offered three land titles as security for payment. Those allegations, in my view had not been specifically traversed by the defendants as the words of para. 9 of the defence did not contain terms like "denies' or "does not admit". The allegations of para. 12 of the statement of claim are composite and the defence did not state which of the allegations are denied or admitted. However, the defendants had by para. 18 of the defence denied every allegation contained in the plaintiffs' statement of claim save for those expressly admitted and such a general form of traverse had been accepted as being in sufficient compliance with the rules (Atkin's Court Forms, 2nd Ed. vol 32, p. 35). The only specific admission in para. 9 of the defence is the issuance of the letter but the defendants had at the same time sought to avoid it by saying that it was issued for the purpose of working out a settlement out of court. This means only the issuance of the letter was admitted but not the allegations (2), (3) and (4). This means the plaintiff must still prove that the letter contained an admission of trespass and illegal felling. This the plaintiff can only do by applying to have the letter admitted as evidence. The plaintiff did not do so with the result that the letter does not fall to be considered. I turn now to the guarantee which the plaintiffs alleged contain an admission.

Again, Mr. Primus submitted that the guarantee was not admitted as evidence Mr. Seibing had not sought to adduce it. Mr. Seibing replied that the guarantee had been admitted by the defendants. The relevant pleadings referred to are para. 13 of the statement of claim and para. 10 of the defence which are reproduced here:

> 13. By a joint and several guarantee dated the 16th day of February 1987 the Second, Third, Fourth and Fifth Defendants jointly and severally agreed to pay the First Plaintiff the whole amount recoverable from the First Plaintiff for the illegal felling of timber from the Concession belonging to the First Plaintiff. The Plaintiffs shall refer to the said guarantee for its full terms and effects at the trial of this action.
>
> 10. Save in so far as the said Guarantee was executed, the Defendants say that the Plaintiff exercised undue influence over the Defendants and the said Defendants had no alternative but to execute the said Guarantee. Further or in the alternative the Defendants say that the Plaintiffs misrepresented to the Defendants that the Plaintiffs have no intention to commence civil proceedings and that as an alleged aggrieved party they will not pursue the illegal felling matters in the criminal courts.

The same comments I made earlier with regards to the letter apply here. There was no express admission that the personal guarantee contains an admission of trespass and illegal felling and it was in fact generally traversed by the said cl. 18 of the defence. For the same reasons as for the letter, the guarantee does not fall to be considered.

This leaves the MOU which the plaintiffs also rely on as establishing trespass and illegal felling. The MOU is in these terms:

MEMORANDUM OF UNDERSTANDING

This serves to confirm the meeting BETWEEN Yap and Sons Borneo Enterprise a Company incorporated under the laws of Malaysia having its registered office at 1st Floor MDLB 0748, Block C, Jalan Dam Lahad Datu, Sabah (hereinafter referred to as "the First Party" which expression shall where the context so admits include their successors and assigns) of the one part AND RAKYAT BERJAYA Sdn Bhd/Yayasan Sabah (hereinafter collectively referred to as "the Second Party") of the other part.

WHEREAS:

1. The First Party by their servants or agents have illegally encroached into the timber concession of the Second Party at Ulu Segama Forest Reserve Lahad Datu and has illegally felled and extracted timber therefrom.

2. The First Party has authorised one of its directors namely Yap Kwee Ming to negotiate with the Second Party for a settlement pertaining to compensation for the illegal encroachment felling and extraction of the Second Party's timber.

3. The First Party is desirous of making amends and to pay damages to the Second Party.

NOW THIS AGREEMENT WITNESSETH as follows:

1. In consideration of the Second Party [withholding] legal action against the First Party on the illegal felling and extraction of timber the First Party hereby agree to pay to the Second Party as agreed liquidated damages the sum of MYR1,397,848.78 (hereinafter "the agreed sum").

2. The agreed sum us arrived at based on:

   (i) the Yayasan Sabah's December 1986 timber prices;

   (ii) Calculation of volume at 8m3/tree;

   (iii) Number of tree stumps on ground basis; and

   (iv) specie of timber in accordance to the stumps on ground, with no deduction for rejected logs and logs used for bridges and culverts or any other cause whatsoever.

3. The Agreed Sum does not include: *a*

(i) Royalty payments;

(ii) Legal fees;

(iii) The sum of MYR260,000.00 being amount obtained from tender sale of logs left in the Second Party's area. *b*

4. The First Party shall procure the release of MYR400,000.00 consisting of hauling rebate with the Forestry Department direct to the Second Party.

5. Proposals for the balance of the Agreed Sum is to be worked out and present to the Second Party for approval on or before the 4th day of August, 1987. *c*

6. The First Party shall pay all legal costs fees (on a solicitor - client basis) and stamp duty howsoever incurred in the settlement of this matter.

Signed by the duly approved agent of *d*
The First Party
in the presence of [Signed by YAP KWEE MING]

...
James Y.P. Tsai
Advocate & Solicitor *e*
Sabah Malaysia

As for the reasons for the execution of the MOU, different witnesses, who were signatories of the document, gave different reasons. Semion bin Lalung, a secretary of the 1st defendant said the purpose of that document was "to settle out of court". He thought that the consideration was for the plaintiffs *f* to withhold legal proceedings. The said Susunah Chiu Mei Ling was another signatory and she said the purpose of that document was "to agree on a compensation sum". She said it was prepared by the plaintiffs' lawyers. Cyril Pinso, another signatory, said it was for "the payment of RM1,897,848.78 as compensation". Yet another purpose was stated by Daminus Bianus Aludah, *g* and it was "to put on record what has been agreed between the parties to settle amicably the encroachment by Yap & Son into Yayasan area".

As for the defence, it will be recalled that the defendants had alleged that the MOU was the result of undue influence and misrepresentation. No evidence *h* was led by the defendants in that regard and Mr. Primus did not in his closing address refer to that allegation. Therefore, it has to be taken that the MOU was not the result of any undue influence and misrepresentation. Mr. Primus, however, had submitted that there was no intention to create any legal relations and that the consideration, that is the withholding of legal action, no longer *i*

existed because the plaintiff had commenced the present action. Learned counsel thus contended that the MOU becomes "redundant and of no effect". Learned counsel was quiet as to whether the MOU can be regarded as an admission of trespass and illegal felling of timber. The MOU does recite the fact that the 1st defendant had trespassed and removed timber from the concession area of the plaintiffs. In my view the words of cl. 1 of the preamble of the MOU, which I again reproduce here is clear, *viz.:*

> The First Party by their servants or agents have illegally encroached into the timber concession of the Second Party at Ulu Segama Forest Reserve Lahad Datu and has illegally felled and extracted timber therefrom.

They infer that the 1st defendant had trespassed and removed timber from the concession area of the 1st plaintiff. The next question that has to be answered is whether the signatory Yap Kwee Ming, the 2nd defendant, was expressly or impliedly authorised by the 1st defendant to make the admission. The answer can be gathered from the following address of Mr. Primus:

> DW1 [Yap Kwee Ming] had stated that his father Yap Sang being a typical Chinese businessman did not like the hassle of being used and also at that time Yap & Sons were a reputable company in Lahad Datu doing export of timber. So DW1 was asked to settle and Mr. Yap Sang doesn't want the name of Yap & Sons tarnished. Yap & Sons at that material time was also doing business with Yayasan Sabah and its group of companies. They bought and sold logs to them. Mr. Yap Sang's intention was to maintain a good relationship between Yap & Sons and Yayasan Sabah.
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> This explain why DW1 met Mr. James Tsai in his office at Wisma Yakim to discuss the matter and signed the Memorandum of Understanding and nothing more. There was no intention to create legal relations. Further the consideration why the memorandum was signed i.e. the withholding of legal action no longer exist and the Plaintiffs had commenced legal action against the Defendants. This Memorandum of Understanding now becomes redundant and of no effect.

From that submission it can be said that the authority of Yap Kwee Ming, who was at that time a director of the 1st plaintiff, to sign the MOU is not in question. This leaves the question of whether the presumption that the 1st defendant had trespassed and removed timber had been rebutted and whether they are other reliable evidence which is inconsistent with the admission as to entitle the court to disregard the admission. In so far as the defendants' assertion of undue influence and misrepresentation as vitiating the admission, they had been abandoned. As for other grounds urged as vitiating the admission, they have been set out in the address of Mr. Primus which I have just quoted. Learned counsel had also adverted to evidence adduced by the defendants as vitiating the admission which evidence I will now advert to.

Joakim Beisit, the former Lahad Datu District Forest Officer, testified that at the relevant time the 1st defendant was only a timber exporter and was not at that relevant time engaged in the extraction of timber. The relevant accounts show the 1st defendant to have leased all its heavy equipment to a company called Keniland Development Sdn Bhd "Keniland") which needed them for the purpose of timber extraction. It was suggested by Mr. Seibing to Yap Kwee Ming that because he was the director of both companies he could have manipulated the accounts but he explained that it was not possible because he was in charge of one company while his brother the other and because the two companies have different auditors, which answer I accept as adequate to explain how the accounts could not have been manipulated. In any event, Mr. Seibing in his closing address did not pursue this point and I will take it that the accounts reflect genuinely the transactions therein stated. This means, the defendants have established that the 1st defendant at the relevant time had leased out all their equipment to Keniland and that it is probably true that the 1st defendant was not involved in the extraction of timber. Why did the 1st defendant through Yap Kwee Ming signed the MOU if in fact they did not have the machinery and equipment and therefore could not have extracted timber from the concession area? Yap Kwee Ming had explained and which Mr. Primus had referred to in his address which I have earlier quoted. Mr. Seibing then submitted that Yap Kwee Ming is not a credible witness. This is what learned counsel said:

(c) DW1 YAP KWEE MING admitted signing P3 [the Personal Guarantee] but alleged that Mr. Tsai assured that the matter will be resolved amicably and further that his father did not want the name of YAP & SONS to be tarnished.

(d) He was further led by learned counsel for the defendants to state that his father's intention was to maintain good relationship between YAP & SONS and Yayasan Sabah. However, it will be shown herein that DW1 is an untruthful witness.

(e) DW1 testified that after he signed the MOU P3 (21)-(23) Mr. Tsai asked to pay RM50,000 legal fee and assured he will resolve the matter amicably.

(f) In cross-exam of DW1 it was put to him that the alleged payment of RM50,000 is his after thought and was put to him that he is not telling the truth on this matter.

(g) In defendants' submission it was insisted that the said sum was never disputed, but in fact admitted, received and pleaded by the plaintiffs under para. 6 of their defence to counterclaim.

(h) The plaintiffs' admission under para. 6 above is the RM50,000 referred to under para. 13 of the defence & counter-claim.

(i) Under para. 13 of the defence it states, *inter alia*, that on the 12 July 1988 the defendant's solicitors, on a without prejudice basis, offered RM1,000,000 to the plaintiffs. The first payment was RM50,000, paid by way of cheque, and was encashed by the plaintiffs.

(j) With respect, however, the payment purportedly made by DW1 to Mr. Tsai was on his signing the MOU P3 (21)-(23) on 28 July 1987. The stamp on P3(21)-(23) also confirm that it was made in 1987 whereas the payment of the RM50,000 pleaded under para. 13 of the Defence was in 1988.

(k) With such obvious fact DW1 is "caught with his pants down" as liar.

With respect therefore, the description accorded to DW1 as being straight forward and honest in the defence submission definitely does not befit DW1 on this matter.

As to DW3, the retired DFO, his evidence during cross-exam can be taken as saying that an illegal feller of timber will report to him on the illegal feeling if only just to protect YAP & SONS.

In order to understand that submission, the defence must be adverted to. Para. 13 of the defence said that on 12 July 1988 the defendants made an offer to settle the matter and subsequently, the exact date of which is not stated, made payment of RM50,000 while para. 14 stated that the plaintiffs had in breach of an agreement served the writ on the defendants which prompted the defendants to demand the return of the sum. The plaintiffs in their defence to Counterclaim admitted receipt of the sum. The MOU bears the stamp duty date of 28 July 1987 and therefore the sum of RM50,000 was paid about a year later. However, Yap Kwee Ming said he paid RM50,000 as legal fees to an advocate on the day of signing the MOU and he also said that was the only sum paid. Mr. Seibing contended that because the defence said the payment was made sometime after 12 July 1988 whereas this witness said he paid the amount on the day of signing the MOU, that is on 28 July 1987, this witness was not credible. That, in my view is not a sound basis for concluding the witness to be unreliable. In the first place the witness was not asked to explain why he said he paid after signing the MOU which would be sometime in 1987 when the defence said it was paid sometime in 1988. The witness should at least have been questioned and thus given the opportunity to explain this discrepancy. Especially when the contradiction is in regard to

what he said and with what was pleaded. In the second place, there was in fact a payment of RM50,000 which means the witness was not lying when he said there was payment and the incorrect date of payment could be due to a faulty recollection. After all, the event occurred more than 10 years ago. Therefore, I am unable to agree that Yap Kwee Ming was not a credible witness. I accept as the truth the reasons Yap Kwee Ming had given for signing the MOU even though the 1st defendant had not committed trespass and illegal felling which reasons I have already set out when I reproduced the relevant part of the submission of Mr. Primus, *supra.* My conclusions thus far are sufficient to rebut the admission of the MOU and I do not propose to deal with the other submissions of Mr. Primus concerning the MOU.

Therefore, the plaintiffs have failed to prove trespass and illegal felling against the defendants. There is one question that still trouble me and it is this. Why are the 2nd defendant, 3rd defendant, 4th defendant and 5th defendant being sued and for what. The only cause of action against them that I can think of is upon the guarantee but the closing speech of Mr. Seibing makes no reference to such a cause of action. The relevant part of learned counsel's closing speech reads:

A. PLAINTIFFS' CAUSE OF ACTION

This may be summarized briefly as follows:

(a) 1st Defendant by their servants and agents had illegally and wrongfully entered into the timber concession area belonging to the Plaintiffs' and had illegally felled extracted and removed timber therefrom as shown in [the survey plans].

(b) Upon field survey or inspection of the area trespassed the Plaintiffs' servants or agents discovered that 1,332 timber logs had been illegally extracted which were particularised as follows

Species	**Nos of Stumps**	**Volumes in cubic meters**

[Etc ...]

Learned counsel talked only of trespass and not any claim on the guarantee and that the guarantee was only one of three documents that allegedly contained the admissions of trespass and illegal felling by the defendants. Therefore, there was no claim on the guarantee against the 2nd defendant, 3rd defendant, 4th defendant and 5th defendants.

Even if there was such a claim, the failure to adduce the guarantee as evidence was fatal to the case.

a

Conclusion

In the premises the plaintiffs claim against all the defendants is dismissed with only 80% costs to the defendants in order to take into account the failure of the defendants to prove their counterclaim. The counterclaim of the defendants is dismissed as the defendants had failed to establish undue influence or misrepresentation on the part of the plaintiffs.

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